

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAN MULLIGAN,)
Plaintiff,)
-vs-)
NANCY A. BERRYHILL,¹)
COMMISSIONER OF SOCIAL SECURITY,)
Defendant.)
Civil Action No. 17-1053

AMBROSE, Senior District Judge

MEMORANDUM OPINION

Plaintiff brought this action for review of the final decision of the Commissioner of Social Security denying his application for supplemental security income pursuant to the Social Security Act. (ECF No. 4). Plaintiff's application was denied by an Administrative Law Judge on December 23, 2015. (ECF No. 9-1, pp. 22-29). Plaintiff filed a Request for Review with the Appeals Council. *Id.* at p. 33. On April 26, 2017, the Appeals Council denied the request for review. *Id.* at pp. 36-41. Plaintiff filed the instant action on August 11, 2017. (ECF No. 1).

Pending before the court is Defendant's Motion to Dismiss Plaintiff's Complaint as untimely. (ECF No. 4). Section 405(g) of the Act explains the time frame for filing a civil action as follows:

Any individual, after any final decision of the Commissioner made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner may allow.

Additionally, the notice of denial advises the individual that the Appeals Council assumes the letter of denial will be received within 5 days after the date the denial was issued. (ECF No. 9-1, p. 37). It also advises the individual that he/she may ask the Appeals Council, in writing, to

¹ Nancy A. Berryhill became acting Commissioner of Social Security on January 23, 2017, replacing Carolyn W. Colvin.

extend the time to file an appeal. *Id.* at p. 38.

In this case, the final decision was issued and mailed on April 26, 2017. (ECF No. 9-1, pp. 36-41). Allowing five additional days for mailing, a civil action must have been filed no later than June 30, 2017. There is no indication that Plaintiff filed a request to extend the time. The instant action was not filed until August 11, 2017. (ECF No. 1). Thus, there is no question that the Complaint is untimely.

A statute of limitations period may be equitably tolled, however, "(1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." *Kramer v. Comm'r of Soc. Sec.*, 461 F. App'x 167, 168–70 (3d Cir. 2012), quoting, *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir.1994). None of these circumstances appear to exist in the record. In Response to the Motion to Dismiss, *pro se* Plaintiff merely states that he opposes the motion. (ECF No. 11). As such, I find that the doctrine of equitable tolling does not apply. Consequently, I find that Plaintiff's Complaint is untimely and dismissal of the case is warranted.

An appropriate order shall follow.

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COMMISSIONER OF SOCIAL SECURITY,)
Defendant.)

AMBROSE, Senior District Judge

ORDER OF COURT

THEREFORE, this 2nd day of April, 2018, it is ordered that Defendant's Motion to Dismiss Plaintiff's Complaint (ECF No. 8) is granted and Plaintiff's Complaint is hereby dismissed with prejudice. The case shall be marked closed.

BY THE COURT:

s/ Donetta W. Ambrose
Donetta W. Ambrose
United States Senior District Judge

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